Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

V. B.

v.

ILO

127th Session **Judgment No. 4111**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr I. V. B. against the International Labour Organization (ILO) on 26 August 2016, the ILO's reply of 25 November 2016, the complainant's rejoinder of 28 February 2017 and the ILO's surrejoinder of 31 March 2017;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant, a former official of the International Labour Office, the secretariat of the ILO, alleges that he was subjected to harassment and that the investigation into his allegations of harassment is flawed.

After Ms E., the new chief of the service in which the complainant worked, took up her duties in April 2012, the complainant considered himself to have been subjected to a series of acts constituting harassment.

On 20 March 2013 the complainant and three of his colleagues who also considered themselves to have been subjected to harassment sent a letter to the Human Resources Development Department (HRD) reporting the behaviour of their chief and her mismanagement of the

service. On 14 May 2013 the complainant filed a grievance in which he sought a rigorous and thorough investigation and, subsidiarily, compensation for the injury suffered. When informed, on 16 May, that an investigation was to be opened, the complainant and his three colleagues approved the choice of the independent investigator.

The investigation took place between 20 June and 28 October 2013. On 5 February 2014 the complainant received the full investigation report, which concluded that there was insufficient evidence to substantiate his allegations of harassment. On 7 March the complainant forwarded his comments on the investigation report to HRD, in which he asserted that the investigation had not been conducted "by the book" but that the report nonetheless revealed institutional harassment, which was wrongly described as "mismanagement"[*]. By a letter of 22 July 2014, the Director of HRD informed him that in view of the measures taken on the basis of the investigation report and the conclusions of the report concerning him, he had decided to dismiss the complainant's grievance.

On 21 August 2014 the complainant filed a grievance with the Joint Advisory Appeals Board (JAAB). He criticized in particular the conditions under which the investigation had been conducted and requested the JAAB to recommend that the Director-General set aside the decision of 22 July 2014, with all the consequences that this entailed, and award him compensation for the moral damage suffered, including for the delay occasioned by HRD. On 1 April 2016 the JAAB issued its report. It observed that the definition of harassment used for the purposes of the investigation was "reasonable" but nonetheless "arbitrary", in the sense that, in the absence of a precise definition in the Collective Agreement on Conflict Prevention and Resolution between the International Labour Office and the ILO Staff Union concluded in 2004, which was in force at the material time, it would have been preferable to use the definition contained in the 2001 Collective Agreement on the Prevention and Resolution of Harassment-Related Grievances, in view of the position adopted by the Tribunal in consideration 43 of Judgment 3071. Furthermore, the JAAB was of the

[*] Registry's translation.

opinion that the investigation process and report were seriously flawed and were insufficient to justify the investigator's conclusions. It considered that the fact that some interviews had neither been recorded nor summarized in the investigation report cast doubt on the integrity of the process and that there had been some serious shortcomings in the objective establishment of the facts. Although the JAAB considered that it was not in a position to reach a conclusion on the merits of the harassment allegations, it found that several matters noted in the report – such as the fact that Ms E. had been appointed to the post of chief of service despite being the second-ranked candidate for the post, the fact that the disclosure of this information within the service cast doubt on the confidentiality of the selection procedure, the fact that the complainant's performance was considered insufficient by Ms E., the inappropriate manner in which she and the director of the department had raised the possibility of early retirement, the fact that Ms E. chose a person on a short-term contract to replace her during her absences rather than the complainant, who had greater seniority in the service, the indifference and inability of the director of the department to properly manage a situation deteriorating and, also, the lack of initiative on the part of HRD – were indicative of institutional failings and could be interpreted as constituting harassment. In view of the "significant delays" encountered since the grievance had been filed, the JAAB recommended that the Director-General set aside the contested decision and award the complainant compensation in the amount of 2,500 Swiss francs for the delay of HRD in processing his grievance and the same amount for the delay occasioned by its own proceedings. It further recommended that he be awarded compensation in the amount of 15,000 francs in respect of the procedural flaws that it had found.

By a letter dated 3 June 2016, which constitutes the impugned decision, the Director-General rejected all of the JAAB's recommendations with the exception of the recommendation to award compensation of 2,500 francs for the delay caused by the JAAB. In support of his decision, the Director-General indicated that steps had been taken upon receipt of the grievance and that the investigation had been conducted in strict compliance with "professional investigation standards" and "due process principles".

The complainant asks the Tribunal to set aside the impugned decision. He also seeks redress for the delay occasioned by HRD and by the JAAB, and for the injury suffered, as recommended by the JAAB.

The present complaint is one of four complaints currently before the Tribunal that the ILO requests be joined. The ILO asks the Tribunal to dismiss the complaint. It states that it is "willing to grant the complainant compensation in the amount of 2,500 Swiss francs for the delay occasioned by the JAAB"[*].

In his rejoinder, the complainant does not object to the request for joinder.

CONSIDERATIONS

1. The ILO requests the Tribunal to join the present complaint with three other complaints against it on the grounds that the legal issues raised and the relief claimed in the complaints are identical. It recalls in this regard that the Tribunal joins cases that raise an identical point of law, even when the facts differ somewhat from case to case (see Judgment 1680, consideration 2) and when the factual background is not the same (see Judgment 3554, consideration 7).

However, this case law cannot be applied in the present case. According to the Tribunal, the question as to whether harassment has occurred must be determined in the light of a thorough examination of all the objective circumstances surrounding the events complained of (see, for example, Judgments 4038, consideration 5, and 3871, consideration 12). Since in this instance some of the facts on which the harassment allegations are founded differ from one complaint to another, the Tribunal will not join the cases.

2. The complainant submits that the investigation process was flawed, particularly for the following reasons: the investigator refused to hear some witnesses and some of the interviews conducted by the

[*] Registry's translation.

investigator were neither recorded nor summarized in the investigation report. Furthermore, the adversarial principle was violated in that the complainant did not have the opportunity to be informed of the arguments put forward by Ms E. and to respond to them.

3. The parties do not dispute that the complainant had requested that a number of witnesses be heard, including his former supervisor Mr H., which was refused. The ILO maintains that the investigator acted "within the margin of discretion"[*] available to her to establish the methodology of the investigation and determine which of the proposed witnesses were relevant in order to examine the issue of harassment. Any administrative decision, even when the authority exercises discretionary power, must be based on valid grounds. In this case, the refusal, without valid grounds, to hear witnesses with regard to the complainant's allegations constitutes a breach of due process. This plea is well founded.

4. Furthermore, the complainant contends that the adversarial principle was violated because he did not have the opportunity to read and respond to the arguments put forward by Ms E. The investigator's position is somewhat contradictory, in that she considered that the content of the interviews that she held with the complainants and Ms E. should not be disclosed to the other parties, as such disclosure would delay the investigation because of the reactions that it would prompt, but that follow-up meetings would give the complainant the opportunity to respond to the statements of Ms E. and to the witness statements gathered. The ILO emphasizes that prior to the decision taken by the Director of HRD, a copy of the full investigation report was sent to the complainant on 5 February 2014, asking for his comments thereon, which he submitted on 7 March 2014. The ILO therefore considers that in any case the complainant was made aware, by the investigation report, of all elements of the interviews taken into consideration by the investigator in reaching her conclusions and had the opportunity to respond to them.

[*] Registry's translation.

In his comments to HRD concerning the investigation report, the complainant made a series of observations concerning the investigation and noted that during the investigation he had not had the opportunity to read and respond to the arguments put forward by Ms E. The minutes of two meetings held by the investigator with Ms E. (Annex 6), as well as the latter's detailed response to the complainant's allegations, in the form of a thirteen-page document dated 15 September 2013 (Annex 7), were attached as annexes to the investigation report. The complainant thus had the opportunity to submit his observations in respect of some of the allegations of Ms E., namely those that were attached as annexes to the investigation report.

However, it should be noted that the annexes concerned only two of the four interviews held by the investigator with Ms E. and that no minutes of the other two interviews were taken. As for the follow-up meetings, during which the complainant was allegedly informed of the responses of Ms E. and the witness statements, the substance of the resultant exchanges was not recorded. Consequently, it is not possible to verify whether the complainant was correctly informed at this stage. In any case, the ILO admits that only "some" elements were communicated to the complainant during these meetings.

It must therefore be concluded that since some of the statements gathered by the investigator were neither recorded nor summarized as such in the investigation report or the annexes thereto, the complainant was unable to respond to them in the comments that he was invited to submit to HRD concerning the report. Nor was he able to verify whether the investigator, in her report, had correctly interpreted the statements of which no minutes were taken. According to the Tribunal's case law, a complainant must have the opportunity to see the statements gathered in order to challenge or rectify them, if necessary by furnishing evidence (see Judgments 3065, consideration 8, and 3617, consideration 12). This did not occur in this case with regard to the unrecorded statements.

The Tribunal therefore considers that, in these circumstances, the adversarial principle was disregarded. This plea is well founded.

5. It may be concluded from the foregoing, without there being any need to examine the other pleas relating to the unlawfulness of the investigation process, that the impugned decision was based on a flawed investigation report and must therefore be set aside, except with regard to the award of compensation in the amount of 2,500 Swiss francs, to which further reference is made below.

6. The JAAB, while considering that it was unable to examine fully the facts of the case or to reach a conclusion on the merits of the allegations of harassment, found that the investigation report had brought to light events which pointed to institutional failings that could be interpreted as constituting harassment in the light of the Tribunal's case law (Judgment 3250), a view with which the complainant concurs.

The events to which the Board refers are, first of all, the Director-General's decision to appoint Ms E. to the post of chief of service when she had been ranked in second place, behind Ms C.H., who had assumed the role ad interim pending the outcome of the competition. The fact that the complainant had knowledge of this information, when he had not taken part in the competition, cast serious doubts on the confidentiality of the process. This appointment had contributed to the conflict that had arisen within the service. It was therefore difficult for the complainant, who had served the greatest number of years, to accept hearing, in his beginning-of-cycle assessment interview with Ms E. in May 2012, that his performance was considered insufficient and that his work did not correspond with his grade. Above all, the complainant felt offended by the manner in which Ms E. and the director of the department raised the possibility of early retirement with him. During this meeting, which was held in the Delegates' Bar, in other words in a public place, Ms E. raised her voice when giving her opinion on the complainant's performance, which she deemed mediocre. Moreover, Ms E. chose to be replaced during her absences by a person on a short-term contract, which made the complainant feel undervalued, at a time when he was close to retirement. While personal relationships in the service deteriorated rapidly, to the point of creating an unhealthy work environment characterized by a lack of any mutual respect, trust, communication and courtesy, the

director of the department and HRD showed no initiative, and no informal dispute resolution mechanism was set in motion.

7. It is true that a long series of examples of mismanagement and omissions that compromises the dignity and career objectives of a complainant can constitute institutional harassment (see Judgments 3315, consideration 22, and 3250, consideration 9). However, the only elements which can be said to constitute harassment are those for which there is no reasonable explanation (see Judgments 4038, consideration 18, 3447, consideration 9, and 2524, consideration 25).

The appointment of a chief of service cannot in itself constitute harassment. The same is true of the breach of confidentiality relating to the ranking of candidates upon completion of the selection procedure. With regard to the evaluation by Ms E. of his performance, the complainant does not provide evidence that it could not reasonably be explained. With regard to the incident at the Delegates' Bar, the investigator and HRD note that the choice of this location and the manner in which Ms E. expressed herself were inappropriate and offensive to the complainant. With regard to the replacement of Ms E. during her absences by a person on a short-term contract, HRD recognised that such a practice, while not illegal, was inappropriate. That practice had ceased after the complainant had challenged it. As for the failure of the director of the department and HRD to intervene when the situation continued to deteriorate, this is clear from the investigation report and was recognized by the JAAB. Although some of the failings or tactlessness described above are regrettable, they were not sufficiently serious and repeated to be characterized as institutional harassment.

Therefore, the Tribunal considers that the facts noted by the JAAB cannot be characterized as institutional harassment.

Nonetheless, a properly conducted investigation might well have uncovered other acts constituting harassment.

8. Where an investigation into a harassment complaint is found to be flawed, the Tribunal in principle remits the matter to the organization concerned so that a new investigation can be conducted. However, in

this case, in view of the considerable delay occasioned by HRD and the JAAB, the Tribunal considers it appropriate not to remit the matter to the ILO.

Since the complainant was denied the right to have his harassment grievance duly investigated, the Tribunal considers it fair to redress the moral injury so caused by ordering the Organization to pay him 15,000 Swiss francs in compensation.

9. Lastly, the complainant argues that HRD took an inordinately long time to process the matter.

In total, it took a little over 14 months to process the grievance. The actual investigation process was conducted swiftly: it took only a little over one month from the filing of the grievance to launch the investigation, which lasted only slightly over four months, including the summer vacation months. However, HRD took a little over three months to forward the full investigation report to the complainant and a little under five months to notify him of its decision after receiving the complainant's comments. While the second delay can in part be explained by the fact that HRD asked the investigator to respond to the complainant's comments, there is no justification in the file for the first delay.

Although it must be taken into account that the complainant took a month to provide his comments and that HRD asked the investigator to respond to them, which may have taken some time, the Tribunal considers that, in view of the circumstances of the case, a period of nine months between the submission of the findings of the investigation and the notification of the decision of HRD is excessive. Harassment cases should be treated as quickly and efficiently as possible, in order to protect staff members from unnecessary suffering, but attention must also be paid to thoroughness and procedure (see Judgment 3447, consideration 7).

The moral injury thus caused to the complainant will be fairly redressed by awarding him compensation in the amount of 1,000 Swiss francs.

10. As to the proceedings before the JAAB, they were also seriously delayed. Whereas the grievance was filed on 21 August 2014, the JAAB's report was issued on 1 April 2016. Both the JAAB and the ILO have admitted this delay, which the Director-General agreed, in the impugned decision, to compensate in the amount of 2,500 Swiss francs.

DECISION

For the above reasons,

1. The Director-General's decision of 3 June 2016 is set aside, save with regard to the award to the complainant of a sum of 2,500 Swiss francs by way of compensation for the delay in the proceedings before the Joint Advisory Appeals Board.

2. The ILO shall pay the complainant the total amount of 16,000 Swiss francs in moral damages.

In witness of this judgment, adopted on 14 November 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ